Supreme Court, U. S.
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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1977

NO. 77-1749

IRENE PEREZ,
Petitioner

VS.

CHARLES BORCHERS,
Individually and as
District Attorney in
and for the 49th
Judicial District of
Texas, et al
Respondents

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

MEMORANDUM OF LAW IN OPPOSITION FOR RESPONDENT A. A. ALVARADO

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INDEX

QUESTION PRESENTED 1

POINTS AND AUTHORITIES 2

CONCLUSION 22

CITATIONS i

CASES

Federal

(Supreme Court)

Monroe v. Pape
365 U.S. 167, 81 S.Ct. 473,
5 L.Ed.2d 492 (1961) . . 5

Pierson v. Ray
386 U.S. 547, 18 L.Ed.
2d 288, 87 S.Ct. 1213
(1967) 4,17,18

Younger v. Harris
401 U.S. 36, 91 S.Ct. 746
27 L.Ed.2d 669
(1971) 21

(Circuit Courts)

Anderson v. Sixth Judicial
District Court of St. Louis
County, State of Minnesota
521 F.2d 420 (8th Cir.
1975) 10

Bonner v. Circuit Court
of City of St. Louis, Mo.
526 F.2d 1331 (8th Cir.
1975) cert. denied 96
S.Ct. 1418, 424 U.S. 946,
47 L.Ed.2d 353
rehearing denied
96 S.Ct. 1525,
425 U.S. 926,
47 L.Ed.2d 773 22

Cadena v. Perasso
498 F.2d 383 (9th Cir.
1974) 5,20

Carmack v. Gibson
363 F.2d 862 (5th Cir.
1966). 4

Duba v. McIntyre
501 F.2d 590 (8th Cir.
1974) cert. denied
96 S.Ct. 1480, 424 U.S. 975,
47 L.Ed.2d 745
(1976) 21

Economy Food and Liquor Co.
v. Frankfort Distillers
232 F.2d 410 (7th Cir.
1956) 3

Gregory v. Thompson
500 F.2d 59 (9th Cir.
1974). 4

Hampton v. City of Chicago
484 F.2d 602 (7th Cir.
1973) cert. denied
415 U.S. 917,
39 L. Ed.2d 471,
94 S.Ct. 1413 5

Hill v. McClellan
490 F.2d 859 (5th Cir.
1974) 4

Pauling v. McElroy
278 F.2d 252,
107 U.S. App.D.C. 372
(1960) cert. denied
364 U.S. 835,
81 S.Ct. 61,
5 L.Ed.2d 60 5

Robichaud v. Ronan
351 F.2d 533 (9th
Cir. 1965) 5

Smart v. Jones
530 F.2d 64 (5th Cir.
1976) rehearing denied
532 F.2d 1375 14

U.S. v. King
482 F.2d 768 (D.C. Cir.
1973) 14

(District Courts)

Camero v. Kostos
253 F.Supp. 331 (D.C.
N.J. 1966) 5

Clark v. Zimmerman
394 F.Supp. 1166 (M.D.
Pa. 1975) 22

Danner v. Moore
306 F.Supp. 433 (W.D.
Pa. 1969) 18

Gilliland v. Hyder
278 F.Supp. 189 (E.D.
Tenn. 1967) 5,19

Pitt v. Coxe
65 F.R.D.355 (E.D.
Pa. 1975) 6

Smith v. McCann
381 F.Supp 1027 (E.D.
Wis. 1974) 17

Thompson v. Montemuro
383 F.Supp. 1200
(E.D.Pa. 1974) 5,20

Wade v. Bethesda Hospital
337 F.Supp. 671
(S.D.Oh. 1971) 10,21

State

Bullard v. State
533 S.W.2d 812 (Tex.
Crim. App. 1976) 14

Trantham v. Slaughter
405 S.W.2d 206 (Tex.
Civ. App. - Eastland
1966, no writ) 14

STATUTES

42 U.S.C.A. §§1983, 1985,
1986, 1988 2,18,19

Tex. Code. Crim. Proc. Ann.
Art. 2.09 (1977) 13
Art. 15.17 (1977). . . . 13
Art. 16.01 (1977). . . . 13,14
Art. 17.05 (1977). . . . 13
Art. 36.03 (Supp. 1978). 14

RULES

Fed. R. Civ. P. 8(a). . . . 2

Fed. R. Civ. P. 9(b). . . . 2

Fed. R. Civ. P. 12(b)(6). . 2

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ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MEMORANDUM OF LAW IN OPPOSITION FOR RESPONDENT A. A. ALVARADO

QUESTION PRESENTED

Can a Motion to Dismiss for failure to state a claim be granted by the trial court on the pleadings alone based on judicial immunity?

ARGUMENT ON POINTS AND AUTHORITIES

I.

A Motion to Dismiss for failure to state a claim upon which relief can be granted under FED. R. CIV. P. 12(b) (6) directs the Trial (District) Court's inquiry to an issue of law, i.e., whether or not well plead facts in Petitioner Perez' Original Complaint constituted allegations upon which relief could be granted. FED. R. CIV. P. 8(a) and 9(b) set out the requirements for a statement of the claim made by Petitioner under 42 USCA §§ 1983, 1985.

Respondent Judge A. A. Alvarado in his Motion to Dismiss challenged not only the legal sufficiency of Petitioner's Original Complaint, but more importantly also negated the unlikely possibility of her proving a cause of action for which relief could be granted. It is

submitted that challenging such sufficiency is proper by way of a Motion to Dismiss, which procedure does not admit that the Judge is liable thereunder. Economy Food and Liquor Co. v. Frankfort Distillers Corp., 232 F.2d 410 (7th Cir. 1956). Without the requirement of a responsive pleading, Petitioner Perez' Original Complaint showed that Respondent A. A. Alvarado was at all times sitting as a judicial officer within his jurisdiction. Allegations that he acted in his individual capacity were mere conclusions. Unlike other cases where Petitioner is in need of discovery to develop facts and of time to properly plead, in this case, all the facts were before the Trial Court in the form of Exhibits, to-wit, Exhibit D of Petitioner's Original Complaint consisting of the Statement of Facts of the preliminary examining trial giving rise to her com-

plaint. Thus the Court was in a position to examine all the facts whether or not plead.

Respondent Judge Alvarado by preliminary motion before the Trial Court below raised the doctrine of judicial immunity. As a Justice of the Peace, he relied on the doctrine of judicial immunity elucidated in Pierson v. Ray, 386 U.S. 547, 18 L.Ed.2d 288, 87 S.Ct. 1213 (1967) not merely in his defense, but more importantly, as a plea to bar the trial itself. Under the circumstances, Respondent Judge A. A. Alvarado is entitled to a dismissal of the claim for damages under a civil rights suit. Gregory v. Thompson, 500 F.2d 59 (9th Cir. 1974), Carmack v. Gibson, 363 F.2d 862 (5th Cir. 1966), Hill v. McClellan, 490 F.2d 859 (5th Cir. 1974).

Judicial immunity has not been an issue on review that Courts have hesitated

to determine solely on the pleadings. Gilliland v. Hyder, 278 F.Supp. 189 (E.D. Tenn. 1967), Cadena v. Perasso, 498 F.2d 383 (9th Cir. 1974), Thompson v. Montemuro, 383 F.Supp. 1200 (E.D. Pa. 1974), unlike review of the actions of law enforcement officers as in Monroe v. Pape, 365 U.S. 167, 81 S.Ct. 473, 5 L.Ed.2d 492 (1961), or Hampton v. City of Chicago, 484 F.2d 602 (7th Cir. 1973) cert. denied, 415 U.S. 917, 39 L.Ed.2d 471, 94 S.Ct. 1413, Robichaud v. Ronan, 351 F.2d 533 (9th Cir. 1965).

While all material allegations of well pleaded facts (when, how, to whom and with what results) in the complaint must be taken as true, these admissions do not extend to inferences, arguments or legal conclusions. Pauling v. McElroy, 278 F.2d 252, 107 U.S.App.D.C. 372 (1960) cert. denied 364 U.S. 835, 81 S.Ct. 61, 5 L.Ed.2d 60; Camero v. Kostos, 253 F.Supp. 331 (D.C.N.J. 1966).

There are important considerations present in this case to apply to the traditionally liberal rules of federal pleading. Petitioner Perez' complaint is not in the nature of pro se pleading but one drawn up by attorneys who represented her at the various stages of the State criminal proceedings. The complaint includes conclusory allegations not because of lack of drafting skills, but because the underlying facts fell short of stating a claim. Additionally, Petitioner did not choose to replead against any of the Respondents either after the Motions to Dismiss had been filed or granted.

This distinguishes the case of Pitt v. Coxe, 65 F.R.D. 355 (E.D. Pa., 1975) relied on by Petitioner, since in that case not only were the pleadings pro se, but the circumstances did not show beyond a doubt that defendant could not prove proper facts. Therein, a Justice of the

Peace had allegedly offered the Defendant a choice of imprisonment while awaiting an unscheduled hearing or the immediate payment of money on an unspecified criminal complaint. Nonetheless, the Court did dismiss the §§1985-1986 counts for lack of averred facts to support conclusory allegations, while allowing repleading on the §1983 action as to a rather blatant set of circumstances.

Petitioner Perez did not and cannot allege well plead facts to show that Respondent Judge Alvarado during the filing of the complaint and the bond setting or in the rulings during the examining trial against her (the two distinct time frames covered by the complaint) was engaging in other than judicial acts. Neither did she allege well plead facts that these judicial acts were in excess of his jurisdiction or in clear absence of it.

Petitioner Perez set out the conclusory allegations that Respondent Judge Alvarado:

(1) ". . . acted outside and beyond the scope of his authority and without authority of law, that he abandoned his quasi-judicial capacity: further (that) the said Judge Alvarado, in performing said acts was not discharging his official duties was not acting in his official capacity and was not in the performance of an integral part of the judicial process" (Petition for Writ App. 34).

(2) "in conducting said examining trial acted without any jurisdiction whatsoever, did not act under authority

of office or in the exercise of his statutory duty and judicial process, but on the contrary, as a part of a preconceived plan or scheme to deny the [Arrestee Perez] the rights to which she is entitled under the Constitution of the United States." (Petition for Writ App. 44).

(3) caused Petitioner Perez to be denied a fair and impartial examining trial and a legally constituted court (Petition for Writ App. 36, 38), to be bound to the next term of the State grand jury without evidence of probable guilt (Petition for Writ App. 42-43) and used lawful means to accomplish an unlawful purpose (Petition for Writ App. 38).

There are no facts alleged or that can be alleged which show Judge Alvarado transcended the bounds of his jurisdiction.

In terms of judicial immunity, jurisdiction means that the Judge must have jurisdiction over the person and the subject matter as well as the power to render the particular decision involved, if he is to be immune from suit for an act performed in his judicial capacity. Wade v. Bethesda Hospital, 337 F.Supp. 671 (S.D.Oh. 1971).

Conclusory allegations that a judge was acting in clear absence of jurisdiction i.e. outside his judicial capacity, have been held to fail to state a claim under the civil rights statutes. Anderson v. Sixth Judicial District Court, St. Louis County, State of Minnesota, 521 F.2d 420 (8th Cir. 1975).

II.

Respondent Judge Alvarado takes the position in his Motion to Dismiss (see

Record and Petition for Writ App. 58-62), that Petitioner Perez in her complaint admitted that at all critical junctures of the alleged conspiracy and alleged deprivation of civil rights, Judge Alvarado

> ". . . is and at all times pertinent herein was the duly elected, qualified and acting Justice of the Peace in and for Precinct 1, Place 2, of Webb County, Texas" (Petition for Writ App. 13).

Ironically, Petitioner Perez and her attorneys appeared voluntarily before Judge Alvarado for the bond setting, made bail securing Perez' release, and again appeared for the examining trial before Judge Alvarado (Petition for Writ App. 19), never once challenging the jurisdiction of Judge Alvarado on any basis or making any offer of proof. There is no event

or act, surreptitious or otherwise plead in the complaint which triggered the allegations of conspiracy and deprivation of constitutional rights, privileges and immunities other than for the judicial rulings of the magistrate during the time frame alleged, e.g.:

1. Sustaining the objections of District Attorney Borchers as to Petitioner Perez' request to perfect a bill of exceptions and as to witnesses being placed under the rule-TEX. CODE CRIM. PROC. ART. 36.03 (Supp. 1978)-during testimony for the bill of exceptions (Petition for Writ App. 23);
2. Sustaining the objections of District Attorney Borchers to Petitioner Perez' attempts to show the offense was committed not only by Petitioner

Perez, but by other persons. (Petition for Writ App. 24).

Respondent Judge Alvarado was the magistrate at the time of arrest of Perez (Petition for Writ App. 19-20), TEX. CODE CRIM. PROC. ANN. ART. 2.09 (1977), and pursuant to the authority of TEX. CODE CRIM. PROC. ANN. ART. 15.17 (1977), he accepted the filing of the State Criminal Complaint against Petitioner Perez and set the amount of her bond. TEX. CODE CRIM. PROC. ANN. ART. 17.05. (1977)

Judge Alvarado was the magistrate in the examining trial of Petitioner Perez (Petition for Writ App. 20-24) and pursuant to the authority of TEX. CODE CRIM. PROC. ANN. ART. 16.01 et seq. (1977) bound Petitioner Perez to the next regular term of the State grand jury. (Petition for Writ App. 42) During the conduct of an examining trial, the magistrate exercises discretion to excuse witnesses who

testify from being placed under the rule of being excluded from the hearing room. TEX. CODE CRIM. PROC. ART. 36.03 (Supp. 1978). Texas Criminal Practice and Procedure TEX. CODE CRIM. PROC. ANN. ART. 16.01 et seq. extends to an accused like Petitioner Perez the right to request preliminary examining trial, but such right ends upon the return of an indictment by a State Grand Jury. Bullard v. State, 533 S.W.2d 812, (Tex. Crim. App. 1976). That Petitioner Perez was not allowed to present additional witnesses under a bill of exceptions (Petition for Writ App. 33 and Exhibit D to Petitioner's Original Complaint) are the results of judicial acts supported by Trantham v. Slaughter 405 S.W.2d 206 (Tex. Civ. App.--Eastland 1966 no writ) but in any event reviewable in the usual criminal trial procedure that follows indictment. U.S. v. King, 482 F.2d 768 (D.C. Cir. 1973).

In Petitioner's allegations against Respondent Judge Alvarado of deprivation of her civil rights under the Fifth and Fourteenth Amendments to the Constitution of the United States, Petitioner complains of judicial acts. In her allegations of conspiracy to deprive her of the same said rights she juxtaposes overt acts which are merely the usual and necessary contacts between judge, prosecutor, staff, counsel and witnesses in the processing of a criminal case, to-wit:

The actions of Judge Alvarado in accepting for filing the complaint against Petitioner Perez, (Petition for Writ App. 39); setting the amount of bond on Arrestee Perez, accepting Assistant District Attorney Ramos' recommendation as to bond amount and causing Petitioner Perez to face incarceration if she did not make bond, (Petition for Writ App. 40).

The aforementioned are judicial acts as heretofore defined by state statute

supra, or the natural consequences thereof as set out below.

Petitioner's further conclusory allegations are that Tax Assessor-Collector Flores, his deputy Villarreal, and unnamed others were granted unofficial but effective protection from prosecution (Petition for Writ App. 36-37), that news media information given to the general public and prospective grand jury members was intended to show that Petitioner Perez was solely responsible for the offense, (Petition for Writ App. 37) and that Petitioner Perez was judicially blackmailed to account for the shortages in her former place of employment (Petition for Writ 38).

Again these allegations were couched in terms of a conspiracy to cause these things to happen, but there were no words, gestures, or acts on the part of Judge Alvarado underlying these pleadings other than for judicial acts already discussed.

Harms that are incidental to any criminal proceeding brought lawfully and in good faith are not the basis of a civil rights complaint. Smith v. McCann 381 F. Supp. 1027 (E.D. Wis. 1974).

Any Arrestee in the precarious position of Petitioner Perez facing conviction in state criminal courts could make these conclusory allegations in federal civil actions.

III.

Thus, the essential purpose of the doctrine of judicial immunity from suit is served by giving the judge freedom to exercise his discretion and to perform his official duties without fear of subjecting himself to personal liability, because of a Defendant's speculation about the motivation behind a particular decision. The essence of the doctrine is embodied in Pierson, supra at p. 1217:

". . . Few doctrines were more solidly established at

common law than the immunity of judge from liability for damages for acts committed within their judicial jurisdiction . . . [it is] . . . for the benefit of the public, whose interest it is that the judges should be at liberty to exercise their functions with independence and without fear of consequences. . ."

The passage of 42 USCA 1983 did not abrogate the common law rules of judicial immunity from liability for damages as there is a continuing public interest that judges be unfettered in the exercise of their judicial function. Pierson supra.

Judicial immunity is not lost by solely allgeging conspiracy with others who may not claim such defense. Danner v. Moore, 306 F.Supp. 433 (W.D.Pa. 1969).

The immunity of a judicial officer acting within the scope of his jurisdiction is so absolute and well established that it covers a myriad of situations.

In Smart v. Jones, 530 F.2d 64, (5th Cir. 1976) rehearing denied 532 F. 2d 1375, an action under 42 U.S.C.A. §1983, 1985 and 1986, a county judge, one of several defendants in an allegation of conspiracy to wrongfully condemn a landowner's parcel of property and falsely arrest, imprison and criminally prosecute the landowners, was found to be cloaked with judicial immunity in a per curiam opinion by the Court.

In Gilliland v. Hyder, supra a civil rights action against a trial judge on the grounds that the judge failed to allow a convicted man credit on his sentence for the time spent in jail awaiting trial, it was ruled that no claim was recognized since the fixing of a term

in a penitentiary was a judicial function and the judge was held to be immune from suit.

The immunity of a district justice of the peace was upheld even where unnecessary expense and humiliation resulted from the failure to observe procedural requirements in conducting a probation revocation hearing, Cadena v. Perasso, supra, or in the refusal of a judge of a family division of the Court of Common Pleas to openly and thoroughly investigate and impartially review the charges of improper treatment in a youth study center. Thompson v. Montemuro, supra.

Even in cases where the judge exceeds his jurisdiction, (i.e. he has jurisdiction over the person and the subject matter, but the proper conditions are wanting in a particular case for lawfully invoking it), those judicial acts even if done maliciously are subject

to judicial immunity. Wade v. Bethesda Hospital, 337 F.Supp. 671 (S.D.Oh. 1971), and Duba v. McIntyre, 501 F.2d 590 (8th Cir. 1974), cert. denied, 96 S.Ct. 1480, 424 U.S. 975, 47 L.Ed.2d 745 (1976).

The doctrine is that firmly established.

IV.

The doctrine of judicial immunity aside, the instant case wherein Petitioner is not threatened with immediate irreparable injury and where there is an ongoing state criminal court process presents the obvious paradox of a federal court granting awards of civil damages for issues still to be resolved by state courts.

The abstention by a federal court on principles of comity as established under Younger v. Harris, 401 U.S. 36, 91 S.Ct. 746, 27 L.Ed.2d 669 (1971) mandates that federal courts withhold

adjudication of constitutional issues (in this case judicial rulings) in civil damages suits until disposition of them by state courts. Clark v. Zimmerman, 394 F.Supp. 1166 (M.D.Pa. 1975), Bonner v. Circuit Court of City of St. Louis, Mo., 526 F.2d 1331 (8th Cir. 1975) cert. denied 96 S.Ct. 1418, 424 U.S. 946, 47 L.Ed.2d 353, rehearing denied 96 S.Ct. 1525, 425 U.S. 926, 47 L.Ed.2d 773.

CONCLUSION

Respondent Judge Alvarado's acts are clearly within the scope of his jurisdiction. Petitioner's dissatisfaction with those acts, her conclusory allegations of lack of judicial immunity, her suing Respondent Judge Alvarado in his individual capacity, and the tenuous inferences she draws from the state criminal judicial process out of which her complaint arises, are not legally sufficient under any set of facts which

could be averred under the circumstances to state a claim upon which relief can be granted.

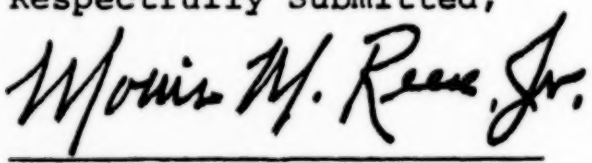
As Petitioner addressed her complaint to a limited time frame in a state criminal process -- from the time shortly before arrest through the holding of a preliminary examination -- the reviewing courts had before them the complete Statement of Facts of the Preliminary Hearing (or Examining Trial) as well as a description of the occurrences associated therewith.

Respondent Judge Alvarado submits that Petitioner's allegations were more in the nature of pretrial criminal discovery and evidentiary objections that could best be presented in the State Criminal Courts.

Respondent A. A. Alvarado's Motion to Dismiss is supported by the long standing doctrine of judicial immunity,

the granting of which motion by the trial court was affirmed by the Court of Appeals for the Fifth Circuit. Accordingly, this Honorable Court should not grant the Petition for Writ of Certiorari to review the judgment of the Court below.

Respectfully Submitted,



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CERTIFICATE OF SERVICE

I, MORRIS M. REESE, JR., one of the attorneys for A. A. Alvarado, Respondent herein, hereby certify that on the 15TH day of July, 1978, I served copies of the foregoing Memorandum of Law in Opposition to Petition For Writ Of Certiorari, on the Petitioner and Co-Respondents by mailing copies in duly addressed envelopes, with first class postage prepaid, to their respective attorneys, as follows: J. G. Hornberger, Esq., Attorney for Petitioner, at 915 Victoria, Laredo, Texas 78040; H. C. Hall, III, Esq., Attorney for Respondents Francisco J. Flores, Carlos M. Zaffirini and Arturo Villarreal, at 511 Sames-Moore Building, Laredo, Texas 78040; C. R. Borchers, Esq., Attorney for Respondents C. R. Borchers, Donato Ramos, Steve Whitworth and Sharon Trigo at P. O. Box 1343, Laredo, Texas 78040.

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